

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ANTHONY DAVIS,

Defendant-Appellant.

UNPUBLISHED

May 17, 2011

No. 295267

Gogebic Circuit Court

LC No. 09-000074-FC

Before: HOEKSTRA, P.J., and MURRAY and M. J. KELLY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and assault with a dangerous weapon (felonious assault), MCL 750.82, on an aiding and abetting theory, MCL 767.39. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to serve concurrent prison terms of 8 to 30 years on the armed robbery conviction and 4 to 15 years on the felonious assault conviction. Defendant appeals as of right, and we affirm.

Defendant's conviction arose from an incident that occurred on April 26, 2008, at the Ojibway Correctional Facility. On that date, defendant accompanied another prisoner, Anthony Burnett, to the cell of two other prisoners, Corey Warfield and Matthew Winowiecki. There, defendant removed some personal items from the cell's locker while Burnett held the other two men at knifepoint. One of the victims, Warfield, chased after defendant and Burnett when they exited the cell. Burnett used a homemade knife to stab Warfield in the back of the head and then Burnett and defendant fled to a nearby bathroom. Warfield and two correctional officers identified defendant at trial as the second man involved in the robbery.

Defendant first argues the trial court's denial of his motion to excuse a prospective juror for cause violated his constitutional rights. Specifically, the prospective juror, whose father had been employed as a state trooper, indicated that he might be predisposed to find the testimony of a Michigan State Police trooper credible. However, he also acknowledged that a defendant enjoys a presumption of innocence and that the prosecutor would have to prove his case before defendant could be convicted. Defendant exercised a peremptory challenge when his challenge for cause failed.

A criminal defendant has a constitutional right to be tried by a fair and impartial jury. US Const Am VI; Const 1963 Art 1 §20; *People v Miller*, 482 Mich 540, 547; 759 NW2d 850 (2008). However, a party must exhaust all peremptory challenges or refuse to express

satisfaction with the jury in order to preserve an issue related to jury selection. *People v Taylor*, 195 Mich App 57, 59-60; 489 NW2d 99 (1992).

A four-part test is used to determine whether an error in refusing a challenge for cause merits reversal. There must be a clear and independent showing on the record that: (1) the court improperly denied a challenge for cause; (2) the aggrieved party exhausted all peremptory challenges; (3) the party demonstrated the desire to excuse another subsequently summoned juror; and (4) the juror whom the party wished later to excuse was objectionable. [*People v Lee*, 212 Mich App 228, 248-249; 537 NW2d 233 (1995) (internal citation omitted).]

Here, defendant used only eight of twelve available peremptory challenges and the prospective juror was excused pursuant to one of those challenges. Thus, defendant's argument fails.

Defendant also argues that his constitutional rights were violated when the trial court denied his motion to quash the district court's bindover. In particular, defendant argues that the evidence presented at the preliminary exam only established that he was present at the prison at the time that Burnett assaulted Warfield, but that there was no evidence that he took part in any robbery. However, even if we were to accept defendant's assertion for the sake of argument, reversal would not be required. "[A] magistrate's erroneous conclusion that sufficient evidence was presented at the preliminary examination is rendered harmless by the presentation at trial of sufficient evidence to convict." *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). We conclude there was sufficient evidence presented to sustain defendant's convictions.

In reviewing a sufficiency of the evidence argument, we apply a de novo standard. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). Due process prohibits a criminal conviction unless the prosecution establishes the essential elements of a criminal charge beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence and the reasonable inferences it engenders are sufficient to support a conviction, provided the prosecution meets its burden of proof. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). In addition, the prosecution is not required to disprove all innocent theories when a case is based on circumstantial evidence. *Id.* A reviewing court must examine the evidence in a light most favorable to the prosecution, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Hawkins*, 245 Mich App at 457. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements that must be established beyond a reasonable doubt to sustain a conviction for felonious assault are: "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of immediate battery." *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007) (quotation marks and citation omitted). The felonious assault statute specifically identifies a knife as a dangerous weapon. MCL 750.82(1). In order to obtain a conviction for armed robbery, the prosecution must prove a defendant engaged in the following: (1) the use of force or violence, or the commission of an assault or putting a person in fear; (2) the felonious taking of property from the victim's person or presence; and (3) possession of "a dangerous weapon or an article used or fashioned in a

manner to lead any person present to reasonably believe the article is a dangerous weapon,” or representation, oral or otherwise, of possession of a dangerous weapon. MCL 750.529; *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004). The armed robbery statute does not define the term “dangerous weapon.” MCL 750.529. However, a knife is generally considered to be a dangerous weapon. See *People v Banks*, 454 Mich 469, 473; 563 NW2d 200 (1997). Finally, to convict a defendant under an aiding and abetting theory, the prosecution must prove beyond a reasonable doubt that “(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement.” *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (quotation marks and citation).

Taken as a whole and viewed in a light most favorable to the prosecution, the evidence presented below and the reasonable inferences stemming from that evidence were sufficient to support defendant’s convictions. *Hawkins*, 245 Mich App at 457. The evidence presented at trial established that defendant accompanied Burnett, who was visibly armed with a home-made knife, to Warfield and Winowiecki’s room, advised against and prevented the two victims from resisting, removed Warfield’s personal items, and then left the room with Burnett, taking Warfield’s property with him. The evidence also established that Warfield was struck in the back of the head with the knife after he chased the pair. This evidence was sufficient to establish that an armed robbery had occurred and was followed by a felonious assault. Because defendant arrived with Burnett, took the property, accompanied Burnett after leaving the room, and followed Burnett into the bathroom after Warfield was injured, the jury could reasonably conclude that defendant had assisted in the commission of both crimes. *Robinson*, 475 Mich at 15. Here, where the assault occurred as a result of Burnett and defendant’s conduct in attempting to escape from the scene of the robbery, the assault could be properly found to be a natural and probable consequence of that crime. The fact that defendant attempted to conceal his identity and was aware that Burnett was armed supports the inference that he intended for the crime to occur or had knowledge of Burnett’s intent to commit armed robbery. Thus, under *Robinson*, defendant could properly be found guilty of felonious assault under an aider and abettor theory.

Defendant next argues that he is entitled to resentencing, but he failed to properly preserve any of his numerous arguments by raising an objection at sentencing. See *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Thus, our review of this issue is for plain error affecting the defendant’s substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

Defendant first argues that his sentence is invalid because the trial court failed to consider mitigating factors when imposing his sentence. The mitigating factors defendant identifies include strong family support and the possibility of a mental disease or defect related to substance abuse issues.

There is no corroboration in the record for defendant’s assertion that he has strong family support. Nor is there any support in the record for defendant’s assertion that he suffers from a mental disease or defect related to substance abuse issues. Moreover, defendant disregards the fact that his sentence *did* constitute a downward departure from the recommended minimum

range under the sentencing guidelines. Finally, the sentencing transcript indicates that the trial court reviewed the PSIR before imposing sentence. Thus, there is no evidence that the trial court failed to consider any relevant mitigating evidence in sentencing defendant. *People v Nunez*, 242 Mich App 610, 618; 619 NW2d 550 (2000). As a result, defendant's assertion of ineffective assistance of counsel on this basis must also fail. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).¹

We likewise reject defendant's argument that he is entitled to resentencing because the trial court relied on incomplete information, asserting that the trial court should have conducted an assessment of his rehabilitative potential through intensive alcohol, drug, and psychiatric treatment. Although MCR 6.425(A)(1)(e) requires a written report to be submitted to the court prior to sentencing which includes "the defendant's medical history, substance abuse history, if any, and, *if indicated*, a current psychological or psychiatric report," (emphasis supplied) we are satisfied that such a report was not indicated in the instant case given the lack of any supporting evidence to the contrary.²

Defendant's argument that the sentence imposed amounts to cruel and unusual punishment, see US Const, Am VIII; Const 1963, art 1, § 16, is equally lacking in merit for a sentence within the guidelines range is presumptively proportionate, and a sentence that is presumptively proportionate is not cruel or unusual punishment. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). If a sentence within the range is presumptively proportionate, it stands to reason that a sentence *below* the range is also proportionate.

This brings us to defendant's argument that his sentence is constitutionally barred by the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) and its progeny, but our Supreme Court has clearly and consistently held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v McCuller*,

¹ Defendant's additional argument that the sentence imposed was improper because the trial court failed to articulate how it arrived at the respective maximum sentences of 30 years for the armed robbery conviction and 15 years for the felonious assault conviction is also without merit. "A trial court must articulate its reasons for imposing a sentence on the record at the time of sentencing." *People v Conley*, 270 Mich App 301, 312; 715 NW2d 377 (2006). Here, the trial court provided an explanation for the sentence it imposed and specifically concluded that the sentences imposed were more proportional to the instant offense than the recommended range.

² Defendant's argument that he is entitled to resentencing because his sentence was based on inaccurate information is similarly lacking support. A PSIR is presumed to be accurate, and a trial court may rely upon the report unless effectively challenged by the defendant. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Defendant did not challenge the accuracy of the PSIR at the sentencing hearing, and while defendant argues that the PSIR was incomplete because an assessment of his rehabilitative potential was lacking, we already rejected that assertion, and he has failed to identify any other specific inaccuracies on appeal.

479 Mich 672, 683; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

Defendant also filed a standard 4 brief raising two issues. First, defendant contends the trial court admitted footage from the surveillance tape in error.³ We disagree.

Generally, a trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). However, because this evidentiary issue is unpreserved, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant has failed to adequately explain why the admission of the evidence was improper or how he was prejudiced by such alleged error. *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008). In any event, to the extent defendant appears to argue that his identification was based on surveillance footage that was not introduced at trial, this assertion is belied by the record. The robbery victim's identification of defendant was based on his personal observation as was the identification from one of the corrections officers. Moreover, the surveillance footage introduced at trial showed the suspects entering the victims' room, leaving a few minutes later, and the physical altercation between Warfield and Burnett. This depiction was relevant to the charges and defendant has not asserted that the video was unfairly prejudicial. Thus, the evidence was properly admitted. See *People v Sharbnaw*, 174 Mich App 94, 102-103; 435 NW2d 772 (1989).

Alternatively, defendant asserts that he was denied the effective assistance of counsel when his trial counsel failed to object to the admission of the surveillance video footage, as well as numerous other errors not identified in the statement of question presented. As noted above, there was no error related to the admission of the video surveillance footage, and defense counsel has no obligation to make a meritless objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). We decline to address defendant's alternative bases for why he received the ineffective assistance of counsel because they were not properly identified in the statement of question presented. See MCR 7.212(C)(5); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly

³ We note that defendant's statement of the issue asserts that the trial court wrongfully denied him a new trial. In point of fact, defendant never moved for a new trial. As such, we will treat defendant's argument as a claim that evidence was wrongfully admitted at trial.